STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2003
v	No. 236874 Saginaw Circuit Court
TERRY PAUL KRZYZANIAK, Defendant-Appellant.	LC No. 01-019814-FC

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224F, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 16 to 40 years' imprisonment for the armed robbery conviction, 5 to 10 years' imprisonment for the felon in possession of a firearm conviction to be served concurrently, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm and remand for resentencing.

This case arises out of an incident that occurred at "Tony's," a restaurant in Saginaw, on November 28, 2000. On that date, around 8:30 p.m., Tracy Kapitzke was working as a waitress at Tony's when someone approached her from behind and asked her to open the cash register. When she turned around she saw a man holding a shiny revolver. The man again told her to open the register and pointed his gun at her. Kapitzke walked over to the register with the man following her. She then opened the register and threw the money on the counter. The man grabbed the cash, around $100, and then ran out the front door of the restaurant.

Kapitzke believed that she had seen the robber in the restaurant on previous occasions in the weeks prior to the robbery. Although the two never had lengthy conversations, she remembered that he always ordered carry-out strawberry shakes. The police brought Kapitzke a photo lineup, and she was unable to identify anyone from the photo array. Together with Kapitzke, the police prepared a composite of the robber. After the composite was released to the media, a tip provided a nickname of "Chino." The police connected the nickname to the name "Terry Paul *Kreziak*," however, this name did not link to anyone. Months later, more leads led to the police identifying "Chino's" girlfriend, as well as uncovering the defendant's last name, "Krzyzniak." At this point, the police approached Kapitzke with a second photo lineup where she identified defendant as the robber.

The police interviewed "Chino's" girlfriend who confirmed that defendant went by the nickname "Chino." The police searched defendant's house, but they did not find the firearm used in the robbery. The police arrested defendant at his home, and then interrogated him at the police station. After initially denying that he was involved in the robbery, he eventually admitted to the police that he robbed the restaurant. Defendant further stated that he only committed the robbery because he was under duress from two brothers that had threatened to kill him. A tape of defendant's statement to the police was played for the jury at trial.

At trial, both parties stipulated that defendant was a convicted felon at the time of the robbery, and has been ineligible to possess a firearm since November 28, 2000.

Defendant first argues on appeal that the trial court violated his due process rights when it admitted his statement to police as evidence, because, defendant claims that the police interrogated him after he asserted his right to counsel and before counsel was present. We disagree. When reviewing a trial court's ruling on a motion to suppress statements to police, this Court reviews the entire record de novo, but will not disturb a trial court's factual findings regarding whether the waiver of *Miranda*[1] rights was knowing and intelligent unless that ruling was clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). Clear error exists when this Court is left with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Whether a waiver of *Miranda* rights was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently given constitute separate prongs of a two-part test for a valid waiver of *Miranda* rights. *Daoud*, *supra*, 462 Mich 635-639. Both inquiries are analyzed under the totality of the circumstances. *People v Abraham*, 234 Mich App 640, 645; 599 NW2d 736 (1999). The voluntariness prong of the test examines the police conduct to determine whether, in the totality of the circumstances, the statement to police was the product of a free and unconstrained choice. *Id*.; *Givans*, *supra*, 227 Mich App 121. Moreover, a knowing and intelligent waiver requires only that the prosecutor present sufficient evidence to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use his statements against him at trial. *Daoud*, *supra* at 643-644; *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996); *Abraham*, *supra* at 647.

The record reveals that, under the totality of the circumstances, defendant's statement to police was voluntary. Whether a statement was voluntary is determined by examining police conduct. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Defendant never indicated that he had been deprived of food or water, never indicated that he needed medication or medical attention, did not state that he wanted to contact a family member, or make a phone call before he was asked to make his statement. Defendant was never threatened either verbally or nonverbally, and was never promised anything by the police to entice defendant to give a statement. Defendant was not excessively detained, deprived of food, and was not injured or intoxicated when he gave his statement. *Abraham*, *supra*, 234 Mich App 645. These facts show that defendant voluntarily waived his Fifth Amendment rights when he freely chose to give his statement to the police. *Givans*, *supra*, 227 Mich App 121.

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Furthermore, the prosecutor presented sufficient evidence to demonstrate that defendant understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use his statements against him, therefore, defendant's waiver of his rights was knowing and intelligent. *Daoud*, *supra,* 462 Mich 643-644; *Cheatham*, *supra,* 453 Mich 29; *Abraham*, *supra,* 234 Mich App 647. The testimony at the *Walker*[2] hearing showed that Barry Dobis, a detective with the Saginaw Police Department, advised defendant of his Constitutional rights before defendant was asked to give a statement. Dobis presented an "Advice of Rights" form to defendant, and Dobis read it to him as defendant looked at it. During the course of Dobis reading defendant his rights, defendant stopped him and interrupted him with questions that Dobis answered. A transcription[3] of the conversation includes the following exchange that took place between defendant and Dobis at this time:

> *Dobis:* The statements shown above, you understand what they are. At this point you just are signing because I read those to you and you understand what they are.
>
> *Defendant:* I can get an attorney now?
>
> *Dobis:* Well at, the next point, let me read you the next issue before we go there. What this says is: I am willing to answer questions and make a statement without conferring with an attorney.
>
> *Defendant:* (cannot understand)
>
> *Dobis:* We'll take care of that in a minute, or having an attorney present. No promises – this is an important part – no promises or threats have been made to me in regards to this statement. And it says that part and we'll talk about the issues. He'll sign it and I'll sign it. You said you want to come clean, you said you want to talk to us.
>
> *Defendant:* I want help man.

After the exchange between Dobis and defendant, when Dobis concluded reading the rights, defendant indicated he understood his rights and signed a waiver form indicating that he understood his rights and wished to waive them and speak to the police.

After having listened to the tape of Dobis' questioning of defendant including the exchange set out above, the trial court stated,

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[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] Testimony presented at the *Walker* hearing revealed that after a brief introductory period, the majority of defendant's conversation with the police was tape recorded with the exception of periods of time when the tape recording stopped due to flipping audio tapes, and a problem with the batteries in the tape recorder. It also appears that portions of the conversation were transcribed.

> So, in any event, the full context of the Advice of Rights was read, and the defendant did sign after having that explanation. It was clear from the tone of and the infliction [sic] of the voices that he understand – or understood and that he willingly sought to go forward.

After reviewing the record, we are not left with a definite and firm conviction that a mistake has been made. *Daoud*, *supra*, 462 Mich 629; *Givans*, 227 Mich App 119. The trial court interpreted defendant's response to Dobis as a question rather than a statement of present intent. An ambiguous or equivocal reference regarding counsel does not require that the police cease questioning or clarify whether the accused wants counsel. *People v Adams*, 245 Mich App 226, 237-238; 627 NW2d 623 (2001). It appears to this Court that defendant was given and understood his rights, he was not promised or threatened to make the statement, he was not aware of any officer stating that the courts would be lenient on him if he made a statement, and that no one promised or threatened him in order for him to waive his rights. Defendant was not deprived of food, water, or sleep, and was not intoxicated when he was questioned. Despite defendant's inquiry about an attorney, the facts show that defendant understood his rights and knowingly and intelligently waived them. *Daoud*, *supra* at 643-644; *Cheatham*, *supra*, 453 Mich 29; *Abraham*, *supra*, 234 Mich App 647.

Defendant next argues that the trial court erred when it allowed evidence in at trial that defendant possessed a gun during an earlier robbery for the purported purpose of connecting defendant to this robbery. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection which it asserts on appeal. MRE 103(a)(1), *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). This issue is preserved for trial because defendant objected to the admission of the evidence at trial on the same basis as he objects on appeal.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000); or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). Moreover, an evidentiary error does not merit reversal in a criminal case, unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

On appeal, defendant specifically argues that testimony regarding defendant handling a similar firearm to the one used in the robbery at Tony's restaurant on an earlier occasion was not relevant. He further argues, even if it was relevant, it constituted unduly prejudicial evidence allowing the jury to impermissibly infer that defendant "was a bad man who had done bad things in the past," and was inadmissible. At trial, a witness gave a description of the gun used in the robbery. In defendant's statement to the police, defendant made reference to having contact with

a similar type of gun in the past in reference to another incident. Defendant objected to that portion of his statement being allowed in as evidence several times. The trial court allowed in the evidence stating,

> Okay. I would just state that we've had some testimony about a silver or whatever gun, and with the preface from the officer that this being presented to indicate that on a different occasion the defendant had access to a similar described gun, then I'll determine that it is more probative than prejudicial and will allow it in on that basis.

Then, when Dobis was on the stand, the prosecutor had the following exchange with him:

> *Q*. Detective Dobis, at this point in the taped interview with the defendant and not with respect to anything that happened at the Tony's incident on November 28th did you ask Mr. Krzyzaniak if he ever had any contact with a particular type of gun?
>
> *A*. Yes.
>
> *Q*. Were you aware of from the descriptions in their reports the caliber, the color, the type of gun it was?
>
> *A*. Yes.
>
> *Q*. And so without getting into when exactly but it wasn't – it wasn't him referring to the 28th of November when he spoke in answer to your questions at this point in the tape, is that correct?
>
> *A*. That's correct.

The evidence of defendant's access to a firearm on an earlier occasion related to the identification of defendant as committing the robbery in the instant case. *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989). In *Hall*, the Supreme Court found that the defendant's possession of a sawed off shotgun during an unrelated offense was relevant and admissible to show that the defendant committed the charged armed robbery using a similar weapon. *Id*. at 580-583. The Court went on to explain that the evidence was admissible under MRE 401 "quite apart from also being evidence of other crimes, wrongs, or acts under MRE 404(b)" because "the shotgun itself was equally as direct an item of evidence of defendant's commission of the charged robbery in this case as marked bills or identifiable jewelry would be in another." *Id*. at 583- 584. In the instant case, the evidence that defendant had access to a similar weapon on a previous occasion linked defendant to the robbery at issue, and directly tended to prove defendant's identity as the person who robbed Tony's Restaurant. Therefore, we find that the trial court did not abuse its discretion when it admitted the evidence in question. *Starr, supra,* 457 Mich 494.

Lastly, defendant argues that he is entitled to resentencing because the statutory sentencing guidelines were scored in error, and because defendant's sentence is a departure from the correct guidelines range. When a defendant alleges on appeal that the trial court erred in

scoring the sentencing guidelines or challenges the accuracy of information relied upon in determining a sentence, a defendant must raise the issues in the trial court, in a motion for resentencing or in a motion to remand filed with this Court, in order to preserve the issues for appeal. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). Here, defendant's scoring issue was properly preserved for appeal because he raised it before the trial court during sentencing. This Court reviews the entire record to determine if the trial court's scoring of the guidelines was supported by the evidence. *Leversee, supra*, 243 Mich App 349.

Because the offense in question occurred after January 1, 1999, the Michigan Supreme Court sentencing guidelines do not apply to this case, instead, the legislative guidelines apply. MCL 769.34(1) and (2). Defendant argues that Offense Variable (OV) 13, "Continuing Pattern of Criminal Behavior," was incorrectly scored at ten points. Fifteen points may be assessed under OV 13 in two instances. However, only the first is pertinent here, and it is as follows:

> The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property.

The instructions further state, in pertinent part,

> For determining the appropriate points under this variable, all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Our review of the record reveals that the trial court's scoring of the guidelines was not supported by the evidence. *Leversee, supra*, 243 Mich App 349. At trial, obviously there was evidence of the instant case, and there was also evidence of a pending charge regarding an armed robbery. The third alleged crime, the "Arby's matter," involved the firearm referenced in the confession which formed the basis of the MRE 404(b) evidence. However, we find that the record, at best, only suggests the crime of felon in possession of a firearm. Such crime is a public safety violation and not a crime against a person or property qualifying as an offense under OV 13. Thus we find that the scoring of defendant's guidelines was not supported by the evidence and as such, appellate relief is warranted. *Id*. We remand this case to the trial court for resentencing in accordance with this opinion.

Affirmed, and remanded to the trial court for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio